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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,
Petitioners,

vs.

JOHN DANIEL,
Respondent.

REPLY BRIEF FOR PETITIONERS.

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Table 2

Local 705 Pension Fund

EFFECT OF DIVERSION ON CONTRIBUTION RATES

	Percent Diversion			
	100%	75%	50%	25%
Remaining Fund Assets	$(25,665,050)	$ 11,496,275	$ 48,657,599	$ 85,818,924
Present Value of Benefits Earned to Date	200,537,338	200,537,338	200,537,338	200,537,338
Net Requirement to Date	$226,202,388	$189,041,063	$151,879,739	$114,718,414
Weekly Contribution Requirement	$232.62	$194.41	$156.19	$117.97
Percent Increase in Contribution Requirement Over Present Contribution Rate*	604.92%	489.11%	373.31%	257.50%

* Compared to Weekly Contribution Rate of $33 effective April, 1978.

The results shown in Table 2 for other than the 100 percent diversion do not take into account any increase in the present value of benefits earned to date which would represent the liability for active participants who did not receive a refund and thus would have a benefit liability. On the other hand, the calculation of the weekly contribution rate also does not include these individuals. We are not able to estimate the effect these individuals will have on the weekly contribution rate shown in Table 2 other than to state the rates could be lower.

In addition to the previous calculations, we have also calculated the potential liability to the Local 705 Pension Fund if the terminated vested participants were assumed to be 100 percent vested in an accrued benefit (defined as 3 percent of the normal retirement benefit in effect on the date of termination for each year of plan participation) and the present plan were to provide for immediate and full vesting for all present participants. In this situation, a liability of approximately $14,356,700 would be attributable to the terminated non-vested participants and added directly to the unfunded past service liability of the Local 705 Pension Fund. This amount would have to be amortized over a 40-year period. The annual additional requirement would be $954,168 for an increase of 4.3 percent over the present minimum contribution requirement. Further, the introduction of immediate vesting for present plan participants would cause the annual cost requirement of the present plan to increase by 11.1%.

Diversions of the magnitudes shown could force dissolution of the Local 705 Pension Fund. At a minimum, massive additional employer contributions would be required to provide replacement monies in the funds to maintain financial integrity of the fund for the remaining covered employees.

It should be noted that the potential liabilities shown do not include legal fees and administrative fees which might be substantial. The potential liabilities, although based on estimates discussed in this affidavit, also do not include amounts due to non-vested terminated participants who terminated prior to 1967.

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REPLY BRIEF FOR PETITIONERS.

The questions presented in this case, while not necessarily narrow ones, do "arise in an area where glib generalizations and unthinking abstractions are major occupational hazards. Accordingly, in deciding this particular case, remembering what is not involved is as important as determining what is." *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 465 (1969). The respondent concedes that the issues before this Court do *not* involve the merits of the Local 705 Pension Fund service rule.[1] And because the district court's class order limits the case to present and former participants in the Local 705 Pension Fund,

1. As he advised the district court:

Defendants' argument [that the respondent's claims are so unique or unusual as to preclude a finding of typicality under Fed. R. Civ. P. 23(a)(3)] consistently ignores the fact that this case involves violations of the federal securities laws. As such, the fact that Mr. Daniel worked for 5 years or 25 years with a 1 day or a 1 year break in service is irrelevant. * * * Because the

(Footnote continued on next page.)

to Local 705, and to the Local 705 Pension Fund, this case does *not* involve the claimed misdeeds of others. Nevertheless, a major occupational hazard to a rational decision in this case is the respondent's penchant for emphasizing avowed irrelevancies such as the service rule[2] and the hearsay charges against the petitioner IBT and other pension funds.[3]

In discussing the relevant issues this reply brief will not travel all of the old ground for the sake of repeating why the petitioners were correct and the courts below were wrong. Rather, we shall focus first on two of the respondent's arguments made in this Court which are opposite from those he made in the courts below; i.e., the nature of the duty of disclosure under the anti-

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> longer a union member is in covered employment, the larger his investment in a Teamster pension fund, the length of service of a plaintiff class member only goes to the question of damages and *not* the liability of defendants.

Plaintiff's Reply Memorandum in Support of His Motion for Class Certification at 16.

2. Brief for Respondent at 4-6 & nn.7 & 8, 15, 122 n.100.

3. Brief for Respondent at 8 n.17, 15, 16 n.29, 60, 118 & n.97, 123 n.102, 124 n.103; see also Brief for PROD at 18 n.12, 20 n.14. The respondent attributes to these petitioners positions which they did not take. For example, we agree that a security and a sale may exist in a type of unilateral voluntary contributory pension plan where the employee's contributions are used to purchase the employer's securities, Brief for Respondent at 71 & n.59, but not otherwise, *id.* at 46, 115, based on facts and reasons inapposite to this case and raising issues not before this Court. We do not agree that a security exists in this case, *id.* at 20 n.33; or that a pension benefit paid by a defined benefit plan is either deferred wages, *id.* at 52-53, 86-87, or deferred compensation, *id.* at 18 n.31, points explored at 11-12 *infra.*

Another irrelevant point is raised concerning pension portability. PROD is wrong in saying that portability of or reciprocity for pension credits does not exist between the Local 705 Pension Fund and other pension plans. Brief for PROD at 18 n.12; see also Brief for Respondent at 15. Since January 1, 1973, the Local 705 Pension Fund has been a party to the Joint Council No. 25 Reciprocal Agreement for Teamsters Pension Funds covering fourteen local unions' plans, and it has similar agreements with the Central States Southeast & Southwest Pension Fund and the Chicago Truck Drivers Union, an independent union. See also Brief for Petitioners at 9.

fraud provisions, and that the security created is a certificate of or participating interest in a profit sharing plan. We shall then reply to the respondent's contentions that to form an investment contract the investor need not invest his money; that the respondent's labor or the employer's contributions resulted in the necessary present interest—i.e., an undivided interest—in the Local 705 Pension Fund; that the lure of traditional profits can be subjectively proved; and that the commercial world's ordinary understanding is that an employee's participation in a collectively bargained mandatory noncontributory pension fund is an investment contract. Finally, we shall show that the absence of employee volition is fatal to the court of appeals' finding of a sale.

I.

THE RESPONDENT HAS UNDERMINED THE DECISIONS BELOW BY NOW ARGUING THAT THE LOCAL 705 PENSION FUND DID NOT VIOLATE THE ANTIFRAUD PROVISIONS WHEN IT FAILED TO DISCLOSE THE ACTUARIAL BASIS UPON WHICH AND THE LIKELIHOOD THAT THE RESPONDENT WOULD RECEIVE A PENSION BENEFIT.

The complaint (App. 31a, 33a-34a, ¶¶ 17(B)(5),(6) and 18) says that the Local 705 Pension Fund violated the antifraud provisions by intentionally not stating (1) the actuarial basis upon which and the likelihood that the respondent would receive a pension benefit, and (2) the value of a participant's interest. The district court agreed that those allegations stated federal claim jurisdiction. In the court of appeals the Commission noted the allegations[4] and, with the respondent's other *amici*,[5] fully

4. Specifically, the defendants were alleged * * * to have omitted material facts . . . including the actuarial basis for and likelihood that pension payments would be made to the plaintiff * * *.

Brief for Commission Amicus Curiae at 8.

5. This kind of information, the percentage of currently active workers who are likely to receive a pension benefit under the plan, would be necessary under the securities laws disclosure. . . .

(Footnote continued on next page.)

supported the district court's decision that the affirmative disclosure allegations in the amended complaint stated claim jurisdiction.[6] The court of appeals affirmed (App. 216a, 258a). The respondent supported the court of appeals' decision on ¶¶ 17 and 18 when it asked this Court not to hear this case. Brief for Respondent in Opposition to Petitions for Writs of Certiorari at 6.

However, before this Court the respondent and his *amici* disassociate themselves from the decisions below on that point. Brief for Respondent at 114 & n.94; Brief for Commission at 4-5, 25 & n.18, 26, 29; Brief for PROD at 21; but see Brief for The Gray Panthers at 15, 17, 18, 20 & n.10. They now

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(Footnote continued from preceding page.)

Brief Amicus Curiae for The Gray Panthers at 21.

> The NCCMP and ERIC oppose the district court's decision because if affirmed, it will mean that unions and employers can no longer conceal from employees and prospective employees the critical fact that there is a statistically determinable risk that many employees covered by private pension plans—perhaps as many as one-third to one-half—will never receive pension benefits from those plans.
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> * * * * *
>
> From the perspective of these employees the information required to be disclosed by the district court's opinion is essential.

Motion of Institute for Public Interest Representation for Leave to File Amicus Curiae Brief at 4, 5.

6. The registration provisions, which are commonly referred to as the Securities Act's "disclosure" provisions, to differentiate their function from that of the "antifraud" provisions, are designed to assure that investors will be furnished all material information needed to make an informed investment decision. The mechanism for meeting that objective is the filing with the Commission of a registration statement, and the delivery to investors of a prospectus, containing detailed financial and other information about the security and its issuer. The antifraud provisions, by contrast, do not establish a system for affirmative disclosure consisting of the preparation or filing of documents. While they could, under some circumstances, require that a person make *affirmative disclosures* (which may be oral or written) necessary in order not to mislead a securities purchaser, the antifraud provisions are essentially a generalized prohibition against fraudulent activity.

Brief for Commission Amicus Curiae at 4-5. (Emphasis added.)

label as *dictum* or as erroneous the court of appeals' affirmance of claim jurisdiction over the allegations that the Local 705 Pension Fund was required to make "specific affirmative disclosures, such as actuarial probabilities. . . ." Brief for Commission at 4; see also *id.* at 25, 29; Brief for Respondent at 114; Brief for PROD at 21; Brief for The Gray Panthers at 18. It cannot be said that the decisions below were *dicta* when they sustained claim jurisdiction for the specific allegations in counts I and II of the complaint. What can be said is that the respondent and his *amici* no longer can support the decisions that ¶¶ 17(B)(5), (6) and 18—and the complaint's other affirmative disclosure allegations—state claim jurisdiction, and that the district court should have granted the motions to dismiss.

The respondent's and his *amici's* sudden retreat highlights the substantial uncertainties as to what are the disclosure obligations; uncertainties which place plan administrators in great peril. The Commission attempts to separate the types of disclosure required by the registration provisions from those required by the antifraud provisions. It states that "[t]he registration provisions, which are commonly referred to as the Securities Act's 'disclosure' provisions, are designed to assure that investors will be furnished all material information needed to make an informed investment decision." Brief for Commission at 25; see also note 6 *supra*. Yet the nucleus of the respondent's antifraud complaint is that the Local 705 Pension Fund failed to make the types of disclosures to prospective and present covered employees which, according to the Commission, are mandated by the registration provisions.[7]

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7. In the context of an *intentionally* misleading statement to an employee contemplating an investment in an employee pension plan, the employee-investor needs to be told the true facts relative to the value of his investment—including the risk of loss—at a time when such information has meaning, at a time when the employee can still decide not to make, or not to continue making, the investment.

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And we know that "[a]t the very least it is safe to assert that the disclosures which are material in the registration context are within the same *genre* of disclosure which are required by the antifraud provisions of the federal securities laws," Sonde & Pitt, *Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!"*, 16 How. L. J. 831, 853-54 (1971); or, as put by the respondent, "[t]his need [for disclosure] can be met under either or both the registration and antifraud provisions of the federal securities laws," Brief for Respondent at 43. Thus the court of appeals' conclusions—that the petitioners committed the "quintessential error [of] . . . confus[ing] the requirements of the 1933 Act's registration provisions with the anti-fraud provisions of the 1933 and 1934 Acts" (App. 252a) and that the Local 705 Pension Fund is not subject to the registration provisions (App. 258a & n.61)—are *non sequiturs.*

Whereas the registration provisions—and accompanying rules and forms—may lend some guidance to a plan administrator, Brief for Commission at 25, the antifraud provisions are but a command not to sin—"a prohibition of fraudulent conduct, including the making of false or misleading representations," *id.* at 26—under pain of severe penalty. *See* 3 Loss, *Securities Regulation,* 1435-36 (2d Sd. 1961). Because the Commission, with its "experience and long course of administrative interpretation" of the securities acts, Motion to Participate In Oral Argument at 2, cannot say what information must be disclosed under the antifraud provisions, and therefore the determination of materiality "requires [the plan administrator to make] delicate assessments of the inferences a 'reasonable . . . [employee]'

(Footnote continued from preceding page.)

> When defendants communicate the details of an employee pension plan to an employee and seek to induce his investment and participation on the basis of misrepresentations and omissions, *all facts which a reasonable investor would consider important in the making of an investment decision must be disclosed* under the antifraud rules of the federal securities laws.

Brief for Respondent at 105. (Partial emphasis added.)

would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact," *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 450 (1976) (footnote omitted), the decision below creates enormous uncertainties and perils for all plan administrators.

These are persuasive considerations for not requiring plan administrators to guess at the types of disclosures required by the securities acts but not by the national labor laws as urged by the respondent.[8] Brief for Respondent at 42, 97. And in supporting the engrafting of the capital market criteria concerning the nature and timing of plan disclosures onto a collectively bargained plan, neither the respondent nor the Commission retracts the Commission's flat statement that " 'the area covered by a bill on welfare and pension funds does not, as such, deal with capital-securities markets' ", Brief for Petitioners at 30, made to a Congress which believed that " 'no Federal Statute, regulation or authority . . . provided protection for pension plan beneficiaries,' "[9] *id.* at 29. It is inconceivable that Congress believed that plans like the Local 705 Pension Fund were subject to the uncertainties of and the potentials for protracted litigation and frightful liabilities under the securities acts' antifraud provisions when, in the WPPDA and finally in ERISA, Congress eschewed an analogous private right of action in favor of specific

8. The respondent says that the federal labor statutes do not reach misrepresentations of the type alleged in this case. Brief for Respondent at 42, 97. Nevertheless, count VI of the amended complaint, which incorporates the allegations of count I as violations of § 302(c)(5) of the LMRA, survived these petitioners' motion to dismiss (App. 129a-34a). Allegations concerning the nature of and misrepresentations about plan eligibility rules have been the grist for § 302 litigation. *See, e.g., Kosty* v. *Lewis*, 319 F. 2d 744 (DC Cir 1963); *Burroughs* v. *Operating Engineers Pension Fund*, 542 F. 2d 1128, 1130-31 (9th Cir 1976) (change of eligibility rule without notice); *Johnson* v. *Botica*, 537 F. 2d 930, 933-34 (7th Cir 1976) (claim of arbitrary eligibility rule).

9. PROD disingenuously says that "[t]he 'milieu' of the securities acts was simply not under consideration in any of the legislative proceedings [WPPDA and ERISA] referred to by [the] petitioners." Brief for PROD at 30 n.23.

mechanisms and remedies for the timing and the nature of disclosure. *Compare* WPPDA, §§ 5(a), 6 & 7 (publication of plan description and annual financial report); ERISA, §§ 102-104 (contents of summary plan description and requirement that description be provided to employee within ninety days of employment. Content and filing of annual report); Brief for Petitioners at 31-32, 38-40 *with* App. 254a-56a; Brief for Respondent at 97, 98 n.86, 99, 105, 107 (generalized "self-executing compulsion" to disclose open end "material information").

II.

THE RESPONDENT INITIALLY RAISES IN THIS COURT THE ARGUMENT THAT THE SECURITY IS A CERTIFICATE OF OR PARTICIPATING INTEREST IN A PROFIT SHARING PLAN.

In the district court these petitioners read the complaint (App. 29a, ¶ 12) as alleging that the security was a certificate of or participating interest in a profit sharing plan. Because the respondent "characterize[d] his interest in the Local 705 Pension Fund as an investment contract" (App. 122a), neither the district court (App. 124a-25a) nor the court of appeals (App. 220a n.15) reached the "certificate" issue. That issue is first presented in the respondent's brief on the merits. Brief for Respondent at 38, 83-84. Under these circumstances this Court should not deviate from its normal policy of not considering this contention. *See Cort* v. *Ash*, 422 U. S. 66, 72 n.6 (1975); *Weiner* v. *United States*, 357 U. S. 349, 351 n.* (1958); *cf. Neely* v. *Eby Construction Co.*, 386 U. S. 317, 330 (1967); *Ladner* v. *United States*, 358 U. S. 169, 172-73 (1958). Nevertheless, the defined nature of the pension promised by the Local 705 Pension Fund alone distinguishes it from a profit sharing plan. *Compare* Treas. Reg § 1.401-1(a)(2)(i) & (b)(1)(i) (1978) (pension plan) *with* Treas. Reg. § 1.401-1(a)(2)(ii) & (b)(1)(ii) (1978) (profit sharing plan).

The Commission has seen fit to change its mind concerning the nature of the Local 705 Pension Fund. In the court of appeals the Commission clearly understood that a multiemployer plan such as the Local 705 Pension Fund is a defined benefit plan. Brief for Commission Amicus Curiae at 10. Nevertheless, the Commission tells this Court that such plans "are not, strictly speaking, either defined benefit or defined contribution plans." Brief for Commission at 13. The Commission's present posture evidences either another mutable argument, Brief for Petitioners at 16, 56 n.35, or a total lack of understanding of pension plans, see *Connolly* v. *PBGC*, ... F. 2d ....., 4 Pens. Plan Guide (CCH) ¶ 22,792 (9th Cir 1978); Brief for Petitioners at 53 n.32. In either case no weight should be accorded to the Commission's uninformed views concerning pension plans of the type at issue in this case.

III.

THE RESPONDENT HAS MISAPPLIED THIS COURT'S CRITERIA FOR AN INVESTMENT CONTRACT.

A. The Investor Must Invest His Money.

The respondent has changed the first element of an investment contract—that "a person invests his money", *Howey*, 328 U. S. at 299—to "an investment of value," Brief for Respondent at 18, 51, which may be satisfied either by the employee's "services direct or [by] an investment of money through the form of employer contributions made on behalf of the employee into the Local 705 Pension Fund," *id.* at 51-52. This Court has not said that an employee's services alone satisfy the first *Howey* criterion, the court of appeals did not pass on the issue because it found the employer contributions to be the employee's money (App. 222a, 225a), and the Commission apparently does not urge that position.[10] Nonetheless, the respondent finds support

10. The Commission's initial broad statement "that the employee, through his labor, acquires an interest, together with other

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from *SEC* v. *Addison,* 194 F. Supp. 709 (ND Tex 1961), *Collins* v. *Rukin,* 342 F. Supp. 1282 (Mass 1972), and three commentators. Brief for Respondent at 53-54.

Collins considered only that the employee's labor was a disposition for value for purposes of the statutory definition of a sale. 342 F. Supp. at 1289, 1290. *Addison* did not say whether the employees received consideration in addition to, or only the defendants' promises "that they too would share and participate in the millions of dollars of profits . . . by reason of defendants' extreme gratitude for such non-salaried workers' extraordinary friendship in rendering such services," 194 F. Supp. at 716, or whether the consideration issue was contested.

The commentators cited by the respondent undermine his argument. While one paragraph in Long, *An Attempt to Return "Investment Contracts" to the Mainstream of Securities Regulation,* 24 Oklahoma L. Rev. 135, 161 (1971), Brief for Respondent at 53-54, deals with services as value for *sale* purposes, Brief for Commission at 77 n.61, the next paragraph, which deals with the security question, reveals that it is the commentator's wish, rather than a reality, which the respondent repeats:

> An investment contract as a general classification within the definition of a security also requires that there be an investment of money or money's worth. However, none of the three definitions of investment contract so far considered have recognized the possibility that such a contract could result where the investment was at least in part made by labor performed or for property transferred by the

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employees, in a common fund," Brief for Commission at 31, is later narrowed to mean that the employee's "interest" is acquired "as compensation for his labor * * * which takes the form of contributions to the pension fund," *id.* at 40.

> investor. As a result, certain cases which logically should have been classified as securities have escaped regulation.

(Footnote omitted.)

The same is true of the quotation from Hannan & Thomas, *The Importance of Economic Reality and Risk in Defining Federal Securities*, 25 Hastings L. J. 219, 236 (1974), which is prefaced by the cautionary statement that "[t]he following is an appraisal of the fundamental concepts underlying those promotional schemes which are likely to involve securities. These concepts are compared and contrasted with the current state of the law for the purpose of understanding the direction the definition may take in the future." And the roll of citations urged on this Court, Brief for Respondent at 35-37; Brief for Commission at 48 nn.32-34, does not contain a single case where a court decided that the *Howey* "money" principle was met solely by the services rendered by an employee to an employer.

In seeking to equate the employer's contributions to a collectively bargained mandatory pension plan with the investor's money the respondent inexactly argues that the contributions are the employee's wages whether called wages or compensation. Brief for Respondent at 52, 53-56. Whereas Professor Loss, Brief for Respondent at 52, and *amici*, Brief for Commission at 78; Brief for PROD at 14 n.7; Brief for The Gray Panthers at 10 n.2, 11, may read *Inland Steel Co.*, 77 NLRB 1 (1948), as holding that pension plans are mandatory subjects for bargaining because they are part of the wage structure, the Board does not. The Board recently interpreted its *Inland Steel* decision as the petitioners did, Brief for Petitioners at 49 n.27, to mean that a pension plan is " 'a term and condition of employment' within the meaning of the [NLRA] and is therefore a mandatory subject of bargaining." *Elizabethtown Water Co.*, 234 NLRB No. 68 (1978), 97 LRRM 1210, 1211 & n.5 (footnote omitted).

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United States v. Enmons, 410 U. S. 396 (1973) 14

Weiner v. United States, 357 U. S. 349 (1958)..... 8

Statutes and Regulations.

Employee Retirement Income Security Act of 1974, Sections 102-104, 29 USC §§ 1002-04 8

Treas. Reg. § 1.401-1(a)&(b) (1978) 8

Welfare and Pension Plan Disclosure Act, 72 Stat. 997, 76 Stat. 35, Sections 5-7 8

Miscellaneous.

Hannon & Thomas, The Importance of Economic Reality and Risk in Defining Federal Securities, 25 Hastings L. J. 219 (1974) 11

Long, An Attempt to Return "Investment Contracts" to the Mainstream of Securities Regulation, 24 Oklahoma L. Rev. 135 (1971) 10

3 Loss, Securities Regulation, 1435 (2d Ed. 1961) 6

Sonde & Pitt, Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!", 16 How. L. J. 831 (1971) 6

The respondent and his *amici* fare no better in using compensation and wages as synonyms. Brief for Respondent at 46, 52, 53, 55; Brief for Commission at 78; Brief for PROD at 14; Brief for The Gray Panthers at 10. *Alabama Power Co.* v. *Davis*, 431 U. S. 581 (1977), unlike the court below, did not equate "compensation" with deferred wages. Brief for Petitioners at 48-49. In *Los Angeles Dept. of Water & Power* v. *Manhart*, 55 L. Ed. 2d 657 (1978), this Court said that the department's "pension benefits, and the contributions that maintain them, are 'compensation' under Title VII," citing *Peters* v. *Missouri-Pacific R. Co.*, 483 F. 2d 490, 492 n.3 (5th Cir 1973). 55 L. Ed. 2d at 668 n.23. The court in *Peters*, as the Board in *Inland Steel*, referred to pension plans "as employment conditions under the [NLRA]," 483 F. 2d at 492 n.3, not as deferred compensation as asserted by *amicus*, Brief for The Gray Panthers at 10 n.2. *Manhart* weakens rather than supports the respondent's compensation-is-wages contention. Finally, there is nothing in this Court's references to the pension benefits as compensation made in *Allied Structural Steel Co.* v. *Spannaus*, 57 L. Ed. 2d 727, 737 (1978), which is at odds with *Alabama Power*.

B. The Respondent's Investment Contract Theory Is Premised on the Erroneous Conclusion That He Had an Undivided Interest in the Local 705 Pension Fund.

Unless the respondent had an interest in the Local 705 Pension Fund there was no security. See, e.g., App. 221a, 230a; Brief for Commission at 18 ("the touchstone of the existence of an investment contract is whether an interest [exists] . . ."), 30-37. The interest, according to the court of appeals, is an employee's present undivided interest in the Local 705 Pension Fund acquired from the employer contributions (App. 230a). See also Brief for Respondent at 38, 42, 57, 85. Since it is beyond dispute that the plan's organic documents specifically denied to nonvested participating employees any right in or to the trust,

any payments from the trust, or the employer contributions, Brief for Petitioners at 6-7 & nn.2 & 3, the respondent had no interest—undivided or otherwise—in the Local 705 Pension Fund.[11] Therefore "the touchstone of the existence of an investment contract," Brief for Commission at 18, is missing and the decision below must fall.

C. The Lure of Profits Cannot Be Proved Subjectively and as a Matter of Law That Attraction Is Not Present in This Case.

The respondent says that the *Howey* lure of profits criterion, Brief for Respondent at 47-48 & n.45, and employee volition for purposes of a sale, *id.* at 93, may be proved by exploring the employee's subjective motivation in taking or keeping the job covered by the pension plan.[12] Under this theory, when, as in this case, the employee swears that he was attracted to or remained on the job by the promise of a pension benefit in an amount greater than the employer's contributions on his behalf the *Howey* test and volition are proved. The theory, however, is contrary to *Forman*, to *Blue Chip Stamps*, and to *Northway*.

This Court "reject[s] any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 608 (1969); *see also Blue Chip Stamps*, 421 U. S. at 740-44. The objective standard of the reasonable investor is to be applied to each facet of a private antifraud suit. *See TSC Industries* v. *Northway*, 426 U. S. at 450. *Forman* is a prime example of this Court's application of the objective rather than the subjective standard.

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11. Neither the respondent nor his *amici* has refuted the petitioners' authorities which establish that respondent had no "interest" whatsoever in the Local 705 Pension Fund. Brief for Petitioners at 25.

12. The court of appeals said the same thing in deciding that the respondent made a disposition for value (App. 245a, 246a n.41).

In *Forman*, contrary to the courts below in this case, the inquiry was not whether any of the fifty-seven plaintiffs purchased a cooperative residence based on the *thought* that he or she was going to "profit" thereby in the form of tax advantages, or rental reductions, or savings. Rather, the inquiry was directed to a "[c]ommon sense" analysis, 421 U. S. at 851, of "the economic realities underlying a transaction," *id.* at 849, and resulted in a decision that a security did not exist.

Using the *Forman* approach, we know objectively that the Local 705 Pension Fund and similarly constituted pension funds, which were created in conformity with § 302(c)(5) of the LMRA and § 401 of the Code, were not created for the purpose of raising capital for profit-making purposes and do not represent any of the " 'countless and variable schemes' " to which the antifraud provisions are directed, *Forman*, 421 U. S. at 848. As discussed more fully at 15-18 *infra*, we know that a participant in a collectively bargained mandatory noncontributory pension plan cannot be analogized to a capital market investor. We know objectively that the respondent entered and remained in covered employment before the Local 705 Pension Fund existed but at a time when at least 9.8 million workers were covered by pension plans (App. 232a). See also Brief for Petitioners at 41 n.22. And we know that this is the first case to raise, let alone to decide, the issues presented to this Court. This last point is persuasive that the Local 705 Pension Fund does not " 'in our commercial world fall within the *ordinary* concept of a security,' " *Forman*, 421 U. S. 847-48 (emphasis added), for "[i]t is unlikely that if Congress has indeed wrought such a major expansion of federal . . . jurisdiction in enacting the . . . [securities acts], its action would have so long passed unobserved," *United States* v. *Enmons*, 410 U. S. 396, 410 (1973).

These petitioners do not argue that as a subjective matter each and every employee entered or remained in covered employment without regard to the Local 705 Pension Fund plan. Our arguments are, however, that the commercial world does not

ordinarily conceive of the Local 705 Pension Fund as a security, and that a common sense analysis of the economic realities underlying the Local 705 Pension Fund results in the conclusion that the Local 705 Pension Fund defined benefit plan is not traditional capital market profits which are the motivation for a reasonable employee to enter or remain in covered employment. Based upon this Court's precedents, the type of transaction before this Court—in which the employee becomes a participant in a collectively bargained pension plan as a mandatory incident to the employee's employment—is not within the scope of the federal securities laws.

IV.

THE COMPULSORY AND COLLECTIVELY BARGAINED FOR NATURE OF THE LOCAL 705 PENSION FUND HAS NEGATED EMPLOYEE VOLITION AND THEREBY A SALE.

The respondent and the Commission submit that to find a sale this Court need not find employee volition, but, in any event, that volition is garnered from the employee's right to vote on the negotiated contract or his decision to accept or remain on the job. Brief for Respondent at 118 n.97; Brief for Commission at 21, 85, 86 n.75. The employee is thereby analogized to a shareholder in a corporation. Brief for Respondent at 44-45, 110. We have previously discussed the "ratification" argument. Brief for Petitioners at 57-58. The compulsory nature of the Local 705 Pension Fund negates employee volition, the analogy to a shareholder, and the finding of a sale.

First Nat. Bank of Boston v. *Bellotti*, ... U. S. ....., 55 L. Ed. 2d 707 (1978), considered the constitutionality of a state statute which barred certain expenditures by banks and specified corporations made for the purpose of influencing the vote on referendum proposals which did not materially affect

their businesses, properties, or assets. This Court, in discussing the statute's effect on the corporate shareholders' right to "decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues," *id.* at 729, appended a most instructive note:

> The critical distinction here is that no shareholder has been "compelled" to contribute anything. Apart from the fact, noted by the dissent, that compulsion by the State is wholly absent, *the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason.* A more relevant analogy, therefore, is to the situation where an employee voluntarily joins a union, or an individual voluntarily joins an association, and later finds himself in disagreement with its stance on a political issue. The Street and Abood Courts did not address the question whether, in such a situation, the union or association must refund a portion of the dissenter's dues or, more drastically, refrain from expressing the majority's views. In addition, *even apart from the substantive differences between compelled membership in a union and voluntary investment in a corporation or voluntary participation in any collective organization,* it is by no means an automatic step from the remedy in Abood, which honored the interests of the minority without infringing the majority's rights, to the position adopted by the dissent which would completely silence the majority because a hypothetical minority might object.

Id. at 729 n.34 (partial emphasis added). The court below did not have the benefit of *Bellotti* when it incorrectly analogized a compelled member in the Local 705 Pension Fund to a corporate shareholder (App. 244a-45a).

As in *Bellotti* there exist "substantive differences" between compelled membership in the Local 705 Pension Fund "and voluntary investment in a corporation or voluntary participation in *any* collective organization," 55 L. Ed. 2d at 729 n.34. First, the collective bargaining agreement compels the dissenting employee's participation in the pension plan. Second, the collective agreement is negotiated by Local 705 who the employee

may not have selected and, as an individual matter, may not want as his representative. Third, the employee's relationship to the plan is determined not by the employee's majority representative or employer but by the plan trustees who are appointed by Local 705 and the employer associations and who are not the employee's "representatives". Brief for Petitioners at 50 n.28. Finally, a nonvested employee who leaves the plan by leaving covered employment cannot withdraw the employer contributions. Therefore, the employee has no volition whether to join the plan, or to directly affect the management of the plan,[13] or to "withdraw his investment at any time and for any reason," *Bellotti*, 55 L. Ed. 2d at 729 n.34. By leaving his job the nonvested employee has no claim at all against the pension plan, let alone one which is analogous to that of a dissatisfied shareholder. Brief for Petitioners at 56-57.

The Commission's no sale position was based on the lack of employee volition, a valid position as shown by *Bellotti*, and not on the theory that pensions were gifts. Brief for Petitioners at 56 n.35. The Commission's new arguments that the pension benefits "represent a major element of the compensation package," and that the fall of the pensions-are-gifts theory invalidated its no sale rule, Brief for the Commission at 83, just do not stand scrutiny. In the first place, there is no empirical proof that pension benefits paid by every plan constituted as is the Local 705 Pension Fund are a "major element" as claimed. And antifraud coverage would therefore apply only to those plans where a trier of facts would—if at all possible—decide whether the pension was a "major element" and what is a "compensation package." The Commission's unworkable scheme will generate more uncertainties and undoubtedly more litigation.

In the second place, according to the Commission, the pensions-are-gifts concept died at the latest in 1948 when *Inland Steel* was decided. Brief for Commission at 78. However, the no

13. The corporate shareholder elects his board of directors. The trustees are designated by the trust agreement and selected by the parties to the collective bargaining agreement.

sale position remained in effect with respect to mandatory pension plans for another *thirty years* until the Commission's brief to the court of appeals in this case.

Nonetheless, the gifts versus wages debate goes not to volition but to only that part of the sale issue concerning the existence of a disposition for value. A finding that employer contributions to a plan in return for the employee's labor result in a disposition for value between the employee and the plan does not touch the volitional element of a sale. There can be no sale unless—in addition to value—the employee made a voluntary investment act analogous to the act of a shareholder who purchases or retains stock in a corporation. The volitional element is absent in this case.

Respectfully submitted,

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